Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

October Term, 1999

NORTH STAR STEEL COMPANY,

Petitioner,

v.

MIDAMERICAN ENERGY HOLDINGS COMPANY AND MIDAMERICAN ENERGY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "state action" immunity from federal antitrust law can be premised upon an inference that a state intended to authorize the challenged anticompetitive conduct?

2. In applying the "state action" immunity doctrine, can it be inferred from a state statute authorizing the establishment of exclusive territories for the retail distribution and sale of electricity that there exists a "clearly articulated" and "affirmatively expressed" state policy permitting a vertically integrated utility to utilize its distribution and transmission monopoly to refuse a customer's request to furnish it with electricity obtained from a competing generator?

3. Does a state agency's interpretation that a state statute authorizing exclusive retail distribution and sale territories was intended also to foreclose competition in the generation segment of the electric industry preclude an independent determination by the federal courts as to whether such industry segments constitute distinct markets for purposes of federal antitrust law?

4. If, as maintained by the state utilities board, Iowa's system of exclusive retail service territories makes it unlawful for a regulated utility to distribute and sell electricity obtained from a competing generator for the account of a specific retail customer, is the board engaged in the active supervision of that policy if it allows the utility to determine whether it will engage in such conduct voluntarily?

LIST OF PARTIES

All parties to the proceeding below are listed in the caption. The Iowa Utilities Board participated in the proceedings below as *amicus curiae.*

RULE 29.6 LISTING

North Star Steel Company is a wholly-owned subsidiary of Cargill, Inc. North Star Steel Company has no parent company, subsidiary, or affiliate that has issued shares to the public.

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4. Approval by the state utilities board of MidAmerican's voluntary "pilot program" to sell competitive generation at retail for loads smaller than that of North Star -- the same kind of transaction the board had earlier concluded was absolutely prohibited by state law -- demonstrates that either (1) the state has no policy that sanctions MidAmerican's refusal to make sure a sale to North Star, or (2) the board does not actively supervise and enforce that policy, but leaves to the regulated utility the discretion to determine whether and when it will restrain trade 13

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PETITION FOR A WRIT OF CERTIORARI

North Star Steel Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-13a) is reported at 184 F.3d 732 (1999). The opinion of the district court (App., *infra,* 14a-17a) can be found at 1998 U.S. Dist. LEXIS 22332 (D. Iowa 1998).

JURISDICTION

The court of appeals entered its judgment on July 7, 1999 (App., *infra,* 1a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides, in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 3 of the Clayton Act, 15 U.S.C. § 14, provides, in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Iowa Code § 476.25 provides in relevant part:

> It is declared to be in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.

STATEMENT

North Star, a large consumer of electricity, brought this action against MidAmerican Energy Company in the United States District Court for the Southern District of Iowa on December 8, 1997. North Star alleged that MidAmerican's refusal to distribute and sell to North Star electric energy, obtained from MidAmerican's competitors in the electric generation market, constituted a refusal to deal and a tie-in sale in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14. The jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1337(a). The district court dismissed North Star's Complaint, holding that MidAmerican's conduct was immune from the antitrust laws under the "state action" doctrine. The court of appeals affirmed.

MidAmerican is Iowa's largest electric utility. It purchases, generates, transmits, distributes, and sells electric energy at retail to customers throughout large parts of Iowa and in the neighboring states of Illinois, Nebraska, and South Dakota. (JA 15-16) Of the total electric energy sold annually by MidAmerican at retail, 75% is self-generated, and the remaining 25% is purchased from others. (JA 309).

North Star owns and operates steel mills at several locations throughout the United States. Its mill at Wilton, Iowa, is one of MidAmerican's largest electric customers.

North Star's electric load of approximately 48 MW (JA 76) is delivered at "transmission voltage," *i.e.* directly from MidAmerican's transmission facilities without the use of any retail distribution facilities or equipment. (JA 15) The bulk of North Star's electric load is "non-firm." (JA 20) This means that MidAmerican may, for appropriate reasons, interrupt sales to such load and has no generation facilities dedicated to serve that load. (JA 74)

In September, 1997, North Star requested that MidAmerican either (a) transmit and deliver to North Star electricity purchased by North Star directly from another electric generator, or (b) purchase such electricity on behalf of North Star for transmission and delivery directly to North Star. (JA 20) Under either arrangement, the cost and other terms and conditions of service would have been subject to the approval of the Iowa Utilities Board and MidAmerican would have continued as the sole distributor of electricity to North Star. (JA 67-68, 75) North Star volunteered to fully bear the cost of any additional equipment that might have been required to implement the proposal, although no such additional equipment was thought necessary. (JA 77)

MidAmerican refused. (JA 20, 75, 77c)

North Star instituted this action on December 8, 1997, claiming that MidAmerican's conduct constituted an unlawful refusal to deal, monopolization of essential bottle-neck facilities, and a tie-in sale, which (i) required North Star to purchase generation from MidAmerican as a condition for receiving transmission from MidAmerican, and (ii) excluded other entities from competing with MidAmerican in the generation market, all in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14.

On January 20, 1998, MidAmerican filed a motion to dismiss, which was subsequently treated by the district court as a motion for summary judgment.

After the first oral argument before the district court on MidAmerican's motion to dismiss, and while the matter was *sub judice*, MidAmerican sought from the Iowa Utilities Board a declaratory ruling that MidAmerican's conduct was consistent with Iowa law. Acting only days before MidAmerican filed with the district court a supplemental reply memorandum in connection with the motion to dismiss, the IUB issued the ruling requested by MidAmerican. (App. D) The IUB stated, among other things, that denial of North Star's request was required by Iowa's law establishing exclusive retail distribution territories and that the arrangements requested by North Star would require a change in Iowa law.[1]

On June 23, 1998, the district court granted summary judgment on the ground that Iowa Code §§ 476.22-.26, under which the Iowa Utilities Board granted MidAmerican an exclusive electric retail distribution service area, authorized monopolization of not only the distribution but also the *transmission and generation* markets in electricity. (App. B)

Shortly after this case was dismissed by the district court, however, and without any of the statutory changes it had earlier claimed were necessary, the IUB approved MidAmerican's voluntary "pilot program" to sell electricity purchased from third party generators directly to industrial and commercial loads. Except for its limitation to loads of 10 MW or less, this was precisely the form of arrangement sought by North Star.[2] (App. E)

The court of appeals subsequently affirmed the decision of the district court, finding not only that MidAmerican's conduct qualified for "state action" immunity, but also that the

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[1] *MidAmerican Energy* Co., Docket DRU-98-1 (Declaratory Ruling)(May 29, 1998), *appeal pending, North Star Steel v. Iowa Util. Bd.* (Iowa S.Ct., filed June 23, 1999).

[2] *MidAmerican Energy Co.*, IUB Docket No. TF-97-229 (Order Approving Market Access Service Pilot Project)(August 21, 1998).

Iowa Utilities Board's conclusion that the legislature intended the term "electricity" to encompass all three functional segments of the industry precluded an independent determination whether such functional segments constitute distinct product markets for purposes of federal antitrust law. (App. A)

REASONS FOR GRANTING THE PETITION

Decreased regulation of the electric industry will increase reliance upon the antitrust laws to preserve competition and it is important, therefore, that there be a clear and uniform standard governing the applicability of the "state action" immunity doctrine.

Few industries are as fundamental to the American economy as the electric industry. To light, heat, and cool our homes and businesses, to power our machines, to do all for which we rely upon commercially generated electricity, Americans spend over $200 billion annually,[3] an amount that is nearly three percent of the Gross Domestic Product.[4]

It has long been recognized that the electric industry consists of three separate and functionally identifiable service components. These are generation, transmission and distribution. Many courts and commentators have concluded that each constitutes an identifiable product market for purposes of antitrust analysis,[5] but this was disputed below by MidAmerican.[6]

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[3] U.S. Census Bureau, *Statistical Abstract of the United States 1998*, at 591.

[4] *See Statistical Abstract, supra.*, at 452.

[5] *See, e.g., Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,797-98 (N.D.N.Y. 1980), *citing* Meeks, *Concentration in the Electric Power Industry — the Impact of Antitrust Policy*, 72 Col. L. Rev. 64 (1972); Fairman & Scott, *Transmission, Power Pools, and Competition in the Electric Utility*

Of these three components, only the retail distribution market is generally recognized as being a natural monopoly, "a market which, because of its physical, technological, and/or economic limitations can support only one supplier."[7] Indeed, spurred by the Public Utility Regulatory Practices Act,[8] the Energy Policy Act of 1992,[9] and Iowa's own policy to promote competition in generation,[10] the generation market is quite competitive and increasingly populated with enterprises that compete in the generation of electricity against each other and directly against vertically integrated utilities such as MidAmerican. These generation competitors are ready and — *if transmission is available* — able to provide energy to both utilities and to end-users such as North Star.[11]

This increase in competition in the generation market, combined with more recent federal policies to assure open access to the transmission market,[12] is part of a fundamental

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Industry, 28 Hastings L. J. 1159 (1977). *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-352, n. 8 (1974); *Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747, 759 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 (1973).

[6] *Compare, e.g.*, Declaration of Dr. John W. Wilson, ¶¶ 5-7 (JA 80-81) and Affidavit of Dr. Robert J. Latham, ¶ 6 (JA 69-70) *with* Affidavit of Dr. Joe D. Pace, ¶ 7 (JA 147-148).

[7] *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 76,798, *citing, inter alia, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-352, n. 8 (1974); *Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747, 759 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 (1973).

[8] 16 U.S.C. § 824a-3.

[9] 16 U.S.C. § 824j, *et seq.*

[10] Iowa Code § 476.41.

[11] JA 70, 71, and 76.

[12] *E.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [Regs. Preambles Jan. 1991 - June 1996], FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61347, (1996), *modified*,

industry transition toward decreased regulation. There is widespread agreement among industry observers that such changes in the regulatory environment will result in increased reliance upon antitrust enforcement to protect consumers from the unreasonable exercise of market power.[13]

For the federal antitrust laws to function efficiently and effectively in the emerging competitive markets for electricity, it is imperative that there be no confusion surrounding their reach. Today, however, there is considerable confusion on the fundamental question of what conduct is immune from prosecution under the federal antitrust laws.

There is a split among the federal circuit courts as to whether a "clearly articulated" and "affirmatively expressed" state policy giving rise to "state action" immunity from the antitrust laws can be inferred from a general regulatory regime, causing confusion

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Order No. 888-A, [Regs. Preambles], III FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *petitions for review pending sub nom.*

[13] *E.g.*, Glazer and Little, *The Roles of Antitrust Law and Regulatory Oversight in the Restructured Electricity Industry*, Electricity Journal (May, 1999); Kolasky, *Network Effects: A Contrarian View*, 7 Geo. Mason L. Rev. 577 (Spring, 1999); Eaton, *Recent United States Department of Justice Actions in the Electric Utility Industry*, 9 Conn. J. Int'l Law 857, 858 (1994); Remarks of W. Baer, Director of the Bureau of Competition, Federal Trade Comm'n, *FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric Power before the Conference on the New Rules of the Game for Electric Power: Antitrust and Anticompetitive Behavior* (December 4, 1997)(available at http://www.ftc.gov/speeches/wbbc.htm). *See also* McArthur, *Anti-Trust in the New Deregulated Natural Gas Industry*, 18 Energy L. J. 1, 6 (1997); Piraino, *A Proposed Antitrust Analysis of Telecommunications Joint Ventures*, 1997 Wis. L. Rev. 639, 644 (1997); Remarks of R. Pitofsky, Chairman, Federal Trade Commission, *Competition Policy in Communications Industries: New Antitrust Approaches*, before the Glasser LegalWorks Seminar on Competitive Policy in Communications Industries: New Antitrust Approaches (March 10, 1997)(available at http://www.ftc.gov/speeches/pit1.htm).

about and inconsistency in the reach and enforcement of antitrust law.

This Court has stated repeatedly that immunity from the antitrust laws is not to be lightly inferred[14] and that exemptions are to be construed narrowly.[15] To harmonize federal antitrust laws with the principle of federalism, however, the Court ruled in *Parker v. Brown*, 317 U.S. 341 (1943), that the Sherman Act did not apply to competitive restraints imposed by the various states. Under this "state action immunity" doctrine, absolute immunity is accorded to the actions of a state legislature[16] or of a state supreme court performing a legislative function.[17] Qualified immunity is extended to agencies of state government and private business combinations.

For the action of a state agency to qualify for immunity, it must be determined that the state legislature authorized the agency to engage in the challenged conduct and that, by virtue of such a statutory authorization, the legislature contemplated that anticompetitive effects would logically result.[18] Private business combinations, however, must demonstrate that the challenged activity (1) reflects a "clearly articulated and affirmatively expressed" state policy to displace competition in the specific area with regulation, and (2) is "actively supervised" by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1985).

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[14] *E.g., United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975).

[15] *E.g., Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 159 (1983).

[16] *Parker v. Brown, supra.*

[17] *Hoover v. Ronwin*, 466 U.S. 558, *reh'g denied*, 467 U.S. 1268 (1984).

[18] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

Because the availability of "state action" immunity depends upon the facts and circumstances of each case, it is hardly surprising that in applying *Midcal* some allegedly anticompetitive conduct has been found immune,[19] while in other instances courts have found that conduct was not undertaken pursuant to a "clearly articulated" state policy and was not immune.[20] More recently, however,

> the courts of appeals for the Fifth,[92] and Eleventh[93] Circuits announced a 'foreseeability standard' to determine if the state intended regulation to supplant competition. Under this standard, 'conduct is immunized if it is the foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct.' (citation omitted) The Eleventh Circuit has said: 'A clearly articulated policy can be established if a state statute authorized an agency to regulate the area and 'provides' for a regulatory scheme that inherently displaces unfettered business freedom.'[95]

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[92] *Martin v. Memorial Hosp. at Gulfports*, 86 F.3d 1391 (5th Cir. 1996).

[93] *Praxair v. Florida Power & Light*, 64 F.3d 609 (11th Cir. 1995). *See also Crosby v. Hosp. Auth.*, 93 F.3d 1515 (11th Cir. 1996) (adopting the foreseeability test).

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[19] *See, e.g., Woolen v. Surtran Taxicabs*, 801 F.2d 159 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985); *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, *modified*, 86 F.3d 1028 (11th Cir. 1996).

[20] *See, e.g., Hardy v. City Optical*, 39 F.3d 765 (7th Cir. 1994); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988).

[95] *Praxair v. Florida Power & Light*, 64 F.3d 609, 611 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1678 (1996).

Von Kalinowski, *Antitrust Laws and Trade Regulation*, at § 49.02[2][i].

These courts have improperly expanded to private actors the test properly applied only to state agencies having the attribute of sovereignty. When applied to private conduct, this "foreseeability" test and the notion that legislative intent can be inferred from circumstances represents a clear departure from the first prong of the *Midcal* standard. Its disparate use has created a conflict among the circuits.

For example, although initially attracted to the foreseeability standard,[21] the Ninth Circuit has recently reversed itself, declaring that the issue is not whether the challenged conduct is foreseeable, but whether the state knowingly and specifically authorized the challenged conduct. *Columbia Steel Casting Co. v. Portland GE*, 60 F.3d 1390 (9th Cir. 1995), *opinion withdrawn, substituted opinion on reh'g*, 103 F.D. 1446 (9th Cir. 1996), *amended, reh'g en banc denied*, 111 F.3d 1427, 1439 (9th Cir. 1997), *cert. denied*, 523 U.S. 1112 (1998).[22]

In its decision below, the Eighth Circuit abandoned the criteria established by *Midcal*, abandoned its own precedent

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[21] *A-1 Ambulance Serv. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996).

[22] District courts in the First, Second, and Tenth Circuits are in accord with the Ninth Circuit's view that the existence of a comprehensive regulatory scheme alone is insufficient. *See, e.g., United States v. Rochester Gas & Elec. Corp.*, 4 F. Supp. 2d 172 (W.D.N.Y. 1998); *American Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221 (D. Mass. 1995). *Energy Productivity Sys. v. Public Serv. Co of New Mexico*, No. 88-0852-JC, 1990 U.S. Dist. LEXIS 20798 (D.N.M. June 22, 1990). So, too are earlier district court decisions in the Eighth Circuit. *See Rosemount Cogeneration Joint Venture v. Northern States Power Co.*, 1991-1 Trade Cas. (CCH) ¶ 69,351 (D.Minn. Jan 23, 1991).

on applying *Midcal*,[23] and erroneously joined those circuits that have held that a state's intent to supplant competition can be inferred, thus contributing to the confusion and geographic discrepancy that now surrounds this important national policy.

The court of appeals departed from *Midcal* and erred in concluding that a legislative policy to supplant the competition at issue here could be inferred from a statute that does not clearly articulate or affirmatively express a deliberate legislative policy to supplant competition in the area in which the challenged action occurred.

The finding below that MidAmerican's conduct was immune from prosecution under the antitrust laws was based upon Iowa Code § 476.25. That statute provides that, "in order to encourage the development of co-ordinated statewide electric service *at retail*," the Iowa Utilities Board "may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis." (emphasis added).

In the electric utility industry, the term "at retail" refers to the *distribution* function.[24] On its face, therefore, this exclusive territory law demonstrates, at best, an intent to displace competition in the *distribution* of electricity. It does not clearly articulate or affirmatively express a state policy also to displace competition in transmission or generation.

Inherent in the decisions below is the assumption that the state legislature either (a) was unaware of the distinction between distribution, transmission, and generation, or (b) intended, notwithstanding its using a term of art referring to the distribution market, to displace competition in all three markets. That assumption cannot be squared, however, with

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[23] *Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980).

[24] (JA 85-87).

the legislature's clearly articulated policy to promote competition in the generation market, Iowa Code § 476.41, which demonstrates that the legislature was aware of the distinction among the three markets and believed it possible to displace competition in one while encouraging it in another.

The conclusion that Iowa's statute establishing exclusive retail distribution and sales territories prohibits the sale of competitive generation at retail cannot be based on an objective reading of Section 476.25. It can only be based, as indeed it was, on the *inference*, arising from the existence of a general regulatory scheme, that without clearly saying so the legislature intended to displace competition throughout every segment of the electric industry. That inference cannot satisfy the objective criterion laid down by this Court. It cannot, as shown above, be reconciled with other provisions of Iowa law. Nor can it be reconciled with the state utilities board's approval of a MidAmerican "pilot program", which differs from the transaction requested by North Star only to the extent that it restricts such sales to smaller electric loads.

> **Approval by the state utilities board of MidAmerican's voluntary "pilot program" to sell competitive generation at retail for loads smaller than that of North Star -- the same kind of transaction the board had earlier concluded was absolutely prohibited by state law -- demonstrates that either (1) the state has no policy that sanctions Mid American's refusal to make such a sale to North Star or (2) the board does not actively supervise and enforce that policy, but leaves to the regulated utility the discretion to determine whether and when it will restrain trade.**

At the request of MidAmerican, made while its motion to dismiss was *sub judice*, the Iowa Utilities Board obligingly issued an order declaring, among other things, that (1) MidAmerican's refusal of North Star's request was in

accordance with Section 476.25, and (2) for the service arrangements requested by North Star to be possible, "statutory changes are required."[25] It is clear that both the district court and court of appeals were heavily influenced by this event.

Just two months after the district court dismissed North Star's complaint, however, and without any statutory changes having been made, the Board approved MidAmerican's own proposal for a pilot project that extended to electric loads *smaller* than that of North Star precisely the same service arrangements as had been requested by North Star.[26] If Iowa law, as interpreted by the utilities board, permits MidAmerican to voluntarily provide the services North Star requested, there cannot simultaneously exist a "clearly articulated" and "affirmatively expressed" state law or policy that prevents MidAmerican from providing North Star those very services, or allows MidAmerican arbitrarily to withhold them. Indeed, if it is truly Iowa's policy to permit regulated entities to supplant regulation with competition whenever and however the regulated entity chooses, then it necessarily follows that it is the regulated entity, not the regulatory agency, that is determining whether and when it will restrain trade. Such a regime cannot satisfy the "active supervision" requirement of *Midcal*.

Iowa has a legitimate state interest to encourage coordinated electric service at retail, to eliminate or avoid unnecessary duplication of electric facilities, and to promote economical, efficient, and adequate electric service to the public. State approval of MidAmerican's own "pilot program" demonstrates that the sale of competitive generation at retail is not inconsistent with that objective and that Iowa

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[25] *MidAmerican Energy* Co., Docket DRU-98-1 (Declaratory Ruling)(May 29, 1998), *appeal pending, North Star Steel v. Iowa Util. Bd.* (Iowa S.Ct., filed June 23, 1999.)

[26] *MidAmerican Energy Co.*, IUB Docket No. TF-97-229 (Order Approving Market Access Service Pilot Project)(August 21, 1998).

law neither prohibits such sales nor sanctions MidAmerican's anticompetitive refusal to make such sales to North Star.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 5, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-2987

Submitted: April 22, 1999
Filed: July 7, 1999

North Star Steel Company,

Appellant,

v.

MidAmerican Energy Holdings Company;
MidAmerican Energy Company,

Appellees.

Appeal from the United States District Court
for the Southern District of Iowa

Before McMILLIAN, LOKEN and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

North Star Steel Co. (North Star) appeals from a final order of the United States District Court[1] for the Southern District of Iowa granting summary judgment in favor of MidAmerican Energy Co. and its parent corporation MidAmerican Energy Holdings Co. (collectively referred to as MidAmerican). The district court held as a matter of law that MidAmerican was immune from federal antitrust liability under the state action immunity doctrine. *See North Star Steel*

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[1] The Honorable Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

Co. v. MidAmerican Energy Holdings Co., No. 4-97-CV-80782 (S.D. Iowa June 23, 1998) (*North Star*). For reversal, North Star argues that the district court erred in finding that: (1) Iowa has a clearly articulated and affirmatively expressed policy displacing competition with regulation in the provision of retail electric service; (2) the regulatory policy is actively supervised by the state; and (3) there exists no genuine issue of material fact. For the reasons discussed below, we affirm the judgment of the district court.

Jurisdiction

Jurisdiction was proper in the district court based upon 28 U.S.C. §§ 1331, 1337. Jurisdiction in this court is proper based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed R. App. P. 4(a).

Background

Although the parties basically agree on the relevant facts, they strongly dispute the nature and characteristics of the electric power industry. North Star, a wholly owned subsidiary of Cargill, Inc., operates a steel mill located near Wilton, Iowa. North Star uses a significant amount of electric energy to melt, refine, and shape scrap steel at its Wilton facility. The mill has a peak electric load of 48 megawatts.

MidAmerican is the largest electric utility in Iowa. In fact, MidAmerican owns the only transmission lines capable of supplying the North Star plant, which is located in the area designated under Iowa Code §§ 476.22-.26 (1997) as the exclusive electric service territory of MidAmerican. The company purchases, generates, transmits, and sells electric energy in significant portions of Iowa as well as in several neighboring states. MidAmerican generates approximately 75% of the electricity sold in its exclusive service area, while it purchases the remaining 25% from third party generators. All of the electric energy, however, is sold by MidAmerican under its own "brand name."

In 1979, the Iowa General Assembly enacted legislation authorizing the Iowa Utilities Board (Board) to establish exclusive service territories in which specific electric utilities would provide the sole means of service to customers. *See* IOWA CODE § 476.25 (1997). The legislature found it "in the public interest to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." *Id.* The Board implemented this legislation by promulgating regulations, beginning in June of 1979. *See Establishment of Exclusive Service Areas for Electric Utilities by the Iowa State Commerce Comm'n*, Docket No. RMU78-11 (I.C.C. June 29, 1979) (Order Adopting Rules).[2] In doing so, the state effectively replaced the prior system under which utilities had competed for customers with one in which designated utilities have exclusive service territories.

Even under this regulatory framework, North Star sought to purchase competitively-priced electric energy. North Star, while recognizing MidAmerican as the exclusive distributor of electricity in its territory, wanted either to purchase directly power produced by a third party generator or to have MidAmerican itself purchase power from a third party expressly for transmission to North Star's mill. Under either "retail wheeling" [3] scenario, MidAmerican would remain the sole distributor of electricity to North Star but would not be

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[2] The Iowa State Commerce Commission is the administrative predecessor to the Iowa Utilities Board.

[3] "Retail wheeling" is defined as "allowing a customer to have access to MidAmerican's transmission and distribution facilities so that a customer can procure electricity from a third party to be delivered through MidAmerican's transmission and distribution facilities." *In re MidAmerican Energy Co.*, Docket No. DRU-98-1, slip op. at 1 (I.U.B. May 29, 1998), *aff'd sub nom. North Star Steel Co. v. Iowa Utils. Bd.*, No. AA3127 (Iowa Dist. Ct. Polk County Jan. 29 1999), *appeal docketed*, No. 99-342 (Iowa Feb. 25, 1999).

transmitting power that it had itself generated. MidAmerican rejected North Star's request. North Star brought the present action in federal district court claiming violations of the Sherman Act and Clayton Act by MidAmerican. North Star alleged that MidAmerican violated federal antitrust laws by refusing to allow it access over the transmission lines to alternate sources of electricity, thus preventing North Star from purchasing competitively-priced electricity for its steel mill. North Star alleged that MidAmerican's refusal to allow North Star access to alternate sources of electricity constituted a refusal to deal, monopolization, and an illegal tie-in.

MidAmerican filed a motion to dismiss which later became a motion for summary judgment.[4] However, before the district court ruled on the motion, MidAmerican requested a declaratory ruling from the Board. MidAmerican presented the Board with questions related to MidAmerican's rights and obligations pursuant to the Iowa Code provisions concerning the supply of retail electric service.[5] The Board held that "Iowa's exclusive service territory laws apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission." *In re MidAmerican Energy Co.*, Docket No. DRU-98-1, slip op. at 5 (I.U.B. May 29, 1998), *aff'd sub nom. North Star Steel Co.*

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[4] The district court treated the motion as one for summary judgment since the parties submitted affidavits.

[5] MidAmerican specifically presented the state with three questions. The first question is particularly relevant to this matter:

> Does the Board's assignment of an exclusive service area to MidAmerican, pursuant to Iowa Code §§ 476.22 through 476.26 and related sections, give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within the assigned service area, or are MidAmerican's rights and obligations limited to the transmission and distribution of electricity that may be provided competitively by other sellers to retail customers.

Id. Note that North Star proceeded to file comments in opposition to the Petition.

v. Iowa Utils. Bd., No. AA3127 (Iowa Dist. Ct. Polk County Jan. 29 1999), *appeal docketed*, No. 99-342 (Iowa Feb. 25, 1999). The Board stated that MidAmerican has a statutory duty to provide electric service to customers in its exclusive service area. *See id.* at 7. The Board found that the statutes concerning the supply of retail electric service do not distinguish between the distribution, transmission, and generation of electricity. *See id.* at 6-7. Rather, the IUB interpreted the words "electric service" to include the actual supply of electricity. *See id.* The Board finally noted that there was no substantive difference between a customer directly buying the electricity generated by a third party or making MidAmerican buy the electricity and then distributing it to the customer. *See id.* at 8. Thus, the Board decided that both means of retail wheeling would violate MidAmerican's rights under the exclusive service territory state law and regulations.

Less than a month after the Board issued its declaratory ruling, the district court granted summary judgment in favor of MidAmerican. Referring to the Iowa Code provisions concerning retail electric service, the district court found that "Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers." *North Star*, slip op. at 4. The district court further found that the Board has actively implemented the regulatory scheme enunciated by the Iowa General Assembly. *See id.* Having found that MidAmerican had satisfied both requirements for the state action immunity doctrine, the district court held that MidAmerican was accordingly immune from North Star's claim of antitrust violations. *See id.* at 4-5. The district court further held that there was no genuine issue of material fact and that MidAmerican was entitled to judgment as a matter of law. *See id.* at 3.

The day after the district court granted summary judgment in favor of MidAmerican, North Star filed a petition for judicial review of the Board's declaratory ruling in the

Iowa District Court for Polk County.[6] The state court held that the Board had the authority to issue the declaratory ruling on the questions presented by MidAmerican. *See North Star Steel Co. v. Iowa Utils. Bd.*, slip op. at 8-9. The court affirmed the Board's interpretation of the Iowa statutes, holding that the Iowa state exclusive service territory law and regulations include the generation of electricity. *See id.* at 8-9.

The Board subsequently approved a pilot program that allowed MidAmerican to sell electricity it purchased from third party generators directly to retail customers, with MidAmerican providing only transmission and distribution service. *See In re MidAmerican Energy Co.*, Docket No. TF-97-229 (I.U.B. Aug. 21, 1998). The pilot program is unavailable to North Star, however, because the program's 10 megawatt limit per customer makes it uneconomical for large-load customers like North Star. In part based upon these recent developments, North Star appealed the district court's order granting summary judgment.

Discussion

We review the district court's grant of summary judgment *de novo*. Summary judgment is proper if, assuming all reasonable inferences favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Summary judgment is particularly appropriate when the unresolved issues are legal rather than factual. *See Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

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[6] Under Iowa law, the district court acts in an appellate capacity to correct errors of law by the administrative agency. *See Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992).

North Star first argues that the district court erred in finding that the Iowa statutory provisions concerning assigned exclusive service areas include the generation of electricity. Rather, North Star argues that these regulations apply only to the distribution of electricity, and not the generation of electricity.[7] That is, North Star argues that the Iowa General Assembly may have displaced competition in the distribution of electricity, but not the market for the generation of electricity.

North Star further argues that Iowa's exclusive service regulatory scheme was not enacted with the purpose of displacing competition in the market for generating electricity. North Star recognizes that one can infer a displacement of competition in the distribution market by the exclusive service areas because only one utility distributes electricity to each retail customer. However, North Star contends that the same inference cannot be made with respect to the generation of electricity, because the utilities do not necessarily generate all of the electricity they distribute. North Star points out that MidAmerican only generates 75% of the electricity it distributes in its exclusive service area. The other 25% is produced by third party generators and then distributed by MidAmerican to the retail customers. North Star also emphasizes the pilot program supporting retail wheeling as demonstrating that Iowa has not displaced competition in the market for generating electricity. Thus, North Star contends that Iowa does not have a clearly articulated or affirmatively expressed policy concerning the generation of electricity.

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[7] North Star argues that there are three vertical markets in the industry, each of which has a different level of competition. These markets are: (1) the generation of electric energy; (2) the transmission of high voltage electric power from the generation plants to substations for conversion to delivery voltages; and (3) the distribution of low voltage electricity to retail customers. *See* Brief for Appellant at 14.

North Star also maintains that even if Iowa clearly articulated a policy displacing competition in the generation of electricity, the district court erred in finding that policy to be actively supervised by the state. North Star argues that Iowa does not monitor whether utilities wheel electricity produced by third party generators for the benefit of retail customers. In fact, North Star contends that MidAmerican is able to unilaterally decide whether to even request the Board's approval for such a program. North Star points out that although the Board may regulate the rates MidAmerican charges, the Board exercises no regulatory power with respect to whose generated power is ultimately distributed to retail customers. Therefore, North Star argues that the state action immunity does not apply because the Board fails to actively supervise MidAmerican's anti-competitive conduct.

Finally, North Star maintains that the district court erred in granting summary judgment because disputed issues of material fact, relating to the nature of the electric industry, have to be resolved before MidAmerican's state action immunity claim can be decided. North Star argues that three distinct markets, including (1) generation, (2) transmission, and (3) distribution, comprise the electric industry. North Star points out that there is conflicting expert evidence in the record concerning the nature of the electric industry. North Star's expert asserted the tripartite view of the electric industry, while MidAmerican's expert maintained that the industry is instead a single regulated monopoly at the retail level.

Before we analyze the applicability of the state action doctrine to the instant case, we must first determine what effect the decision by the state court has on these proceedings. The state court's decision affirming the Board's ruling raises the issue of collateral estoppel, also referred to as issue preclusion. Issue preclusion prevents a party to a prior action in which a judgment has been entered from relitigating issues that were raised and resolved in that previous action. *See, e.g.*, *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa

1981). Federal courts must give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered, which in this case is Iowa. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (citing the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738).

The Iowa Supreme Court has enunciated four conditions that must be met before applying issue preclusion: (1) the issue decided must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *See, e.g., Brown v. Kassouf*, 558 N.W.2d 161, 163 (Iowa 1997) (*Kassouf*). Under Iowa law, issue preclusion may be applied to a trial court's ruling on the merits of an issue despite the pendency of an appeal from that ruling. *See Peterson v. Eitzen*, 173 N.W.2d 848, 850 (Iowa 1970) (holding that "[t]he judgment of the trial court is res adjudicata until set aside, modified or reversed"); *see also Cochrane v. Cochrane*, 124 F.3d 978, 982 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998). Moreover, issue preclusion applies to the judgments in declaratory rulings. *See Fournier v. Illinois Casualty Co.*, 391 N.W.2d 258, 260 (Iowa 1986). The Iowa Supreme Court has also ruled that mutuality of parties is not required when issue preclusion is used defensively.[8] *See Kassouf*, 558 N.W.2d at 164.

We hold that, under Iowa law, the prior determination by the state court that the Board's assignment of exclusive service areas includes the generation of electricity collaterally

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[8] The Iowa Supreme Court has found defensive issue preclusion to occur when "a stranger to the judgment [in the former action], ordinarily the defendant in the second action, relies upon [that] judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense." *Brown v. Kassouf*, 558 N.W.2d 161, 164 (Iowa 1997).

estops this court from re-examining that same issue. The issue was identical in both actions and was properly litigated in the state court. Therefore, for purposes of this case, we will assume that under Iowa law the exclusive service territory provisions include the generation of electricity for retail sales.

We now consider the district court's determination that the state's exclusive service territory policy satisfied the requirements for state action immunity. Application of the state action immunity doctrine is a question of law. *See, e.g., FTC v. Hospital Bd. of Directors*, 38 F.3d 1184, 1187 (11th Cir. 1994). In *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), the Supreme Court held that principles of federalism and state sovereignty precluded the application of federal antitrust laws to activity directed by state legislative action. The "state action doctrine" immunizes a private party from antitrust liability if (1) the private party acts pursuant to a "clearly articulated" and "affirmatively expressed" state policy to allow the anti-competitive conduct, and (2) the regulatory policy is "actively supervised" by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*). To satisfy the first prong of the *Midcal* test, the state as sovereign must clearly intend to displace competition in a particular field with a regulatory structure. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). In contrast, the second prong of the *Midcal* test serves essentially an evidentiary function to ensure that there is adequate state supervision of the regulatory policy. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992). That is, the second prong ensures that the state exercises sufficient independent judgment and control over the regulated activity and prevents private parties from engaging in unsupervised anti-competitive behavior. *See id.*

We hold that the district court did not err in finding that Iowa "clearly articulated" and "affirmatively expressed" a policy displacing competition in the market for retail electric service. The state statute expressly provides that its purpose is

to create exclusive service areas which have only one supplier of electricity. *See* IOWA CODE § 476.25 (1997).[9] The policy to displace competition in the provision of retail electric service, including the generation of electricity, is unambiguous because the statute has been interpreted to include the generation of electricity. *See In re MidAmerican Energy Co.*, Docket No. DRU-98-1, slip op. at 5. Thus, the exclusive service territory statute is explicit state authorization for displacing competition in both the distribution and generation of retail electric service.

Furthermore, the fact that MidAmerican does not generate all of its own electricity is irrelevant for our purposes because there is still no competition for retail customers under Iowa's regulatory scheme. *See id.* MidAmerican purchases the other electricity at wholesale, which is an entirely different market from retail.[10] Moreover, the retail wheeling pilot program supports the district court's finding that the state legislature has displaced competition in the electric industry. That program required specific Board approval, which indicates pervasive regulation, and only permits a limited amount of competition in the industry. The pilot program supports the conclusion that there is a clearly articulated policy that does not generally allow competition

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[9] The statute provides that:

> It is declared to be in the public interest to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.

IOWA CODE § 476.25 (1997).

[10] In contrast with wholesale purchases, where the consumer buys electricity for the purpose of resale, retail purchases are meant for actual use by the buyer.

for retail customers. We note that this interpretation is consistent with the Eleventh Circuit's decision in *Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1502 (11th Cir. 1991). In that case the court found that the Alabama legislature had clearly articulated a policy to displace competition in the retail electric market despite allowing some competition for industrial customers. *See id.*

The second prong of the *Midcal* test requires the state to actively supervise its regulatory policy that displaces competition. We hold that the district court did not err in finding that the Board actively supervises the exclusive service territories. Contrary to North Star's argument, the Board does more than regulate rates. *See* IOWA CODE 0167 § 476.8 (1997) (Board is statutorily mandated to ensure that the exclusive service providers supply "reasonably adequate service and facilities" at "reasonable and just" rates). Since establishing the exclusive service areas, the Board has continued to implement the state policy of displacing competition by assigning new customers to exclusive service providers and determining the assigned exclusive service provider in cases of doubt or conflict. Moreover, on numerous occasions the Board has issued administrative decisions applying the exclusive service area statutes to effectuate the policy that provides one retail electric supplier for each customer. *See, e.g., Lamda Energy Marketing Co. v. IES Utilities., Inc.*, Docket No. FCU-96-8 (I.U.B. Aug. 25, 1997). The Board has repeatedly held that violation of the exclusive service territory statutes for the purpose of providing electric service is illegal. *See, e.g., Harlan Municipal Utilities v. Nishnabotna Valley Rural Electric Coop.*, Docket No. SPU-93-16 (I.U.B. July 27, 1994).

Moreover, even less pervasive regulatory regimes have been held to satisfy the active supervision prong under the state action immunity doctrine. For example, Florida law permits utilities to enter into territorial agreements, if they choose, and requires that their agreements be submitted to the Florida Public Service Commission (FPSC) for approval.

Unlike Iowa's statutes, however, Florida law does not empower the FPSC to assign exclusive territories without a territorial agreement between the suppliers. Nevertheless, the Eleventh Circuit held that the FPSC's 1965 approval of an agreement between two utilities dividing service areas satisfied the second prong of the *Midcal* test pursuant to the state's policy of regulating electric service. *See Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 613-14 (11th Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996). In *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996), *modified*, 86 F.3d 1028, the Eleventh Circuit specifically upheld a utility's refusal to wheel power for cogenerators in its service territory, under the state action immunity doctrine. The court held that the state satisfied the active supervision requirement because it "played an active and substantial role in determining the specifics of the economic policy" pursued by the utilities. *Id.* at 1029.

Finally, North Star argues that the district court erred in granting summary judgment because there were disputed issues of material fact concerning the nature of the electric industry, including the deregulation that has recently taken place. As noted, the Board decided that the electric industry was unitary and the state court affirmed that decision. North Star is collaterally estopped from disputing the nature of the electric industry with respect to Iowa's exclusive service territory statute. Because Iowa has a clearly articulated and affirmatively expressed policy displacing competition in the provision of retail electric service, including generation, and the Board actively supervises that policy, there are no disputed issues of material fact that would preclude judgment as a matter of law in favor of MidAmerican under the state action immunity doctrine.

Conclusion

For the reasons stated, we hold that the district court did not err in granting summary judgment in favor of MidAmerican. The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

No. 4-97-CV-80782

NORTH STAR STEEL COMPANY,

Plaintiff,

v.

MIDAMERICAN ENERGY HOLDINGS CO
MIDAMERICAN ENERGY CO.

Defendants.

Order Granting Summary Judgment
in Favor of Defendants

Plaintiff North Star Steel Company (North Star) operates a steel mill near Wilton, Iowa. It is a customer of defendant MidAmerican Energy Company (MidAmerican), a power company that generates, transmits, and sells electric power and energy. Defendant MidAmerican Energy Holdings Company is a public utility holding company and parent of defendant MidAmerican. The court will refer to both defendants collectively as MidAmerican. North Star seeks to purchase from MidAmerican transmission service of electric power from power sources other than MidAmerican. It asserts in this action for declaratory and injunctive relief that MidAmerican monopolizes trade in violation of federal antitrust law. Defendants contend they are immune from liability under the "state action doctrine."

On January 20, 1998, defendants filed a motion to dismiss that plaintiff subsequently resisted. The court held a hearing on the motion on March 13, 1998. The court then

granted the parties additional time to file briefs addressing the applicability of the abstention doctrine. The court also granted the parties additional time to supplement the record and file supporting briefs on the pending motion, now deemed a summary judgment motion. The parties presented further argument on the motion on June 9, 1998. The matter is now deemed submitted for ruling.

I. Abstention. Following the hearing in March, the court invited the parties to address whether this is a case to which the doctrine of abstention should be applied. Plaintiff contends this case is not one that is appropriate for abstention. Amicus Iowa Utilities Board (IUB) supports abstention. On April 3, 1998, defendant MidAmerican alerted the court that it had filed with the IUB on April 1, 1998 a petition for declaratory ruling on issues stemming from this case. MidAmerican asked the court to stay proceedings in this case pending a Board ruling. But on May 29, 1998, the Board issued a declaratory ruling in response to the petition. The ruling is now part of this record. The federal antitrust issues presented in this case are not now pending before any state agency. The court does not abstain from deciding them.

II. Summary Judgment Standard. Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed.R.Civ.P. 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Once the movant has demonstrated that no genuine factual dispute stands in the way of a judgment entry, the burden shifts to the resisting party to present specific admissible evidence showing a genuine dispute on that issue, precluding judgment. *City of Mount Pleasant v. Associated Electric Cooperative*, 838 F.2d 268, 273-74 (8th Cir. 1988).

III. Facts. Plaintiff has not pointed to a single genuine fact dispute or issue in this record. The Iowa General

Assembly has enacted legislation authorizing the establishment of exclusive service territories in the provision of retail electric service. Iowa Code §§ 476.22-476.26. North Star's Wilton, Iowa facility is located within the exclusive service territory assigned to MidAmerican. MidAmerican owns and operates the only high voltage transmission lines capable of servicing North Star's plant. North Star seeks high voltage transmission wheeling of generated electric power that it will purchase from a third party. "Wheeling" refers to the transportation of bulk electric power produced by one party over the transmission facilities of another party for the benefit of the first party or a third party.

IV. The applicable law. The United States Supreme Court has established that private parties are immune from antitrust liability under the "state action doctrine" if their conduct satisfies two conditions. *Southern Motor Carriers Rate Conf. v. United States*, 85 L. Ed.2d 48 (1985). First, they must act pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition. Second, the policy must be "actively supervised" by the state itself. *California Liquor Dealers v. Midcal Aluminum*, 63 L. Ed. 2d 233, 243 (1980).

Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers. *See Iowa Code* § 476.22-.26 (assigned service territories) and § 476.25 (exclusive provision of electric service). Other courts have held that statutory schemes less restrictive than Iowa's evince clear policies to displace competition. *Municipal Utilities Board v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991) (statute permitted some competition for large industrial customers), *Fuchs v. Rural Elec. Convenience Co-op, Inc.*, 858 F.2d 1210 (7th Cir. 1988) (statute similar to Iowa's except utilities authorized to determine exclusive service areas by agreement).

Iowa law confers on the IUB "broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth". Iowa

Code § 476.2(1). The IUB and its predecessor, the Iowa State Commerce Commission, have actively implemented the governmental policy that mandates exclusive service territories, including the assignment of exclusive service territories. They have adjudicated many cases applying and enforcing the policy of exclusive service territories. The IUB interprets "electric service" to mean the generated electricity as well as the maintenance of wires and poles that carry the commodity. *See In re MidAmerican Energy Co.*, docket no. DRU-98-1 (`IUB, May 29, 1998) (no statutory language limits the definition to transmission and generation only, statutory language means "something more").

Defendants have satisfied both prongs of the *Midcal* test; they are therefore immune under the "state action doctrine" from plaintiff's claims asserted in this lawsuit. The motion for summary judgment is granted. The clerk of court shall enter summary judgment in favor of defendants and against plaintiff, with costs assessed to plaintiff.

IT IS SO ORDERED.

Dated this 23d day of June, 1998.

/S/ Charles R. Wolle

Charles R. Wolle, Judge

United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

JUDGMENT IN CIVIL CASE
CASE NO. 4-97-CV-80782

NORTH STAR STEEL COMPANY,

Plaintiff,

v.

MIDAMERICAN ENERGY HOLDINGS CO.;
MIDAMERICAN ENERGY CO.

Defendants

__x__ DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED:

Summary Judgment is entered in favor of defendants and against plaintiffs, with costs assessed to plaintiff.

June 23, 1998
Date

/S/ James R. Rosenbaum
Clerk

/S/ D. Ryan
(By) Deputy Clerk

APPENDIX D

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

DOCKET NO. DRU-98-1

IN RE:

MIDAMERICAN ENERGY COMPANY

DECLARATORY RULING

(Issued May 29, 1998)

On April 1, 1998, MidAmerican Energy Company (MidAmerican) filed with the Utilities Board (Board) a request for waiver. MidAmerican posed three questions to the Board related to MidAmerican's rights and obligations pursuant to IOWA CODE §§ 476.22 and 476.26 (1997) and other generation related provisions of IOWA CODE chapters 476 and 476A (1997). MidAmerican said the ruling was requested in light of a demand by one of its retail customers that MidAmerican use its transmission and distribution facilities for the purpose of retail wheeling to the customer and/or that MidAmerican engage in a wholesale power purchase and sale exclusively on behalf of the customer. For purposes of this ruling, retail wheeling or direct access is defined as allowing a customer to have access to MidAmerican's transmission and distribution facilities so that a customer can procure electricity from a third party to be delivered through MidAmerican's transmission and distribution facilities.

On April 7, 1998, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a

response stating it generally concurred with MidAmerican's suggested responses to the three questions posed to the Board. North Star Steel Company (North Star) filed a notice of intent to comment on April 7, 1998, and filed written comments on April 9, 1998. MidAmerican filed a response to North Star's comments on April 20, 1998. MidAmerican also filed a statement extending the 30-day time frame for a declaratory ruling. IOWA ADMIN. CODE 199-4.4 (1998).

Pursuant to North Star's request, an informal meeting was held on May 4, 1998. Representatives from North Star, MidAmerican, Consumer Advocate, and the Board's staff attended the meeting.

Prior to addressing the hypothetical or assumed facts posed by MidAmerican and the questions it asked the Board to address, a preliminary matter will be discussed. North Star claimed the Board does not have jurisdiction to issue a declaratory ruling or should decline to issue such a ruling because the facts set forth by MidAmerican did not represent a hypothetical set of facts.

Parties rarely, if ever, ask for guidance on matters that do not have some basis in fact. The Board believes the "hypothetical" nature of the facts upon which a declaratory ruling is based is that the facts are assumed for purposes of ruling on the petition, rather than having to be proven by testimony. MidAmerican has not asked the Board to make any factual determinations but only to issue a declaratory ruling based on an assumed set of facts. This is an appropriate request for declaratory relief. *See*, *Bennett v. Iowa Depot of Natural Resources*, 573 N.W.2d 25 (Iowa 1997).

SUMMARY OF RELEVANT FACTS

For purposes of this ruling, the facts which are assumed are set forth on pages 1 and 2 of the MidAmerican's petition:

A customer located within MidAmerican's exclusive service territory, as determined by the Board pursuant to

IOWA CODE § 476.24, has requested access to MidAmerican's transmission and distribution system facilities so that the customer can procure electricity from a third person to be delivered to the customer through MidAmerican's facilities. In the alternative, the customer has requested a buy-sell arrangement where the customer would designate a wholesale supplier from which MidAmerican would purchase electricity at a price to be negotiated between the customer and the supplier. Under the alternative scenario, MidAmerican would be required to resell the electricity to the customer at the same price plus a fee to cover transmission and distribution costs. It is assumed under the hypothetical facts that MidAmerican has said no to the customer's demands.

Under either scenario, it is assumed MidAmerican has provided, and is providing, service to the customer under applicable tariffs, statutes, and Board rules. It is also assumed the customer is not subject to any unreasonable prejudice or disadvantage with respect to the applicable tariffs or made or granted any unreasonable preferences or advantages.

QUESTIONS POSED

MidAmerican requested that the Board address the following three questions:

1. Does the Board's assignment of an exclusive service area to MidAmerican, pursuant to IOWA CODE § 476.22 through 476.26 and related sections, give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within the assigned service area, or are MidAmerican's rights and obligations limited to the transmission and distribution of electricity that may be provided competitively by other sellers to retail customers?

2. Does the Board, as a matter of policy in its implementation of IOWA CODE § 476.25 and related provisions, expect "MidAmerican to decline demands for

retain wheeling in circumstances where the only basis give for the request is the desire of a customer to purchase electricity on a competitive basis in lieu of the exclusive service area provisions of the Iowa statutes?

3. Does the form of transaction (either a direct purchase or a buy-sell arrangement) make any difference to the Board's answers to questions 1 and 2.

SUMMARY OF MIDAMERICAN'S AND NORTH STAR'S POSITIONS

MidAmerican argues Iowa's exclusive service territory statutes provide it with the exclusive right and obligation to sell electricity to retail customers within its assigned service territory. MidAmerican contends the provision of electricity includes the generation, transmission and distribution of electricity. North Star does not dispute that the exclusive service territory statutes apply to transmission and distribution, but contends those statutes, and the accompanying assignments of service territories by the Board, do not apply to generation. In other words, North Star argues the transactions posed in MidAmerican's assumed facts do not constitute retail wheeling because MidAmerican would continue to provide transmission and distribution service.

IOWA EXCLUSIVE SERVICE TERRITORY STATUTES

Iowa's exclusive service territory statutes are found in IOWA CODE § 476.22 through 476.26 (1997). In construing Iowa's service territory statutes, it is important to understand the legislative policy underlying those statutes. IOWA CODE § 476.25 provides, in part:

> It is declared to be in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and

adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.

DISCUSSION AND RULING

Iowa's exclusive service territory laws apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission. MidAmerican has a statutory right, and an obligation, to provide electric service to retail customers located within its exclusive service territory. An example of the utility's obligations is found in IOWA CODE § 476.8, which requires every public utility to furnish "reasonably adequate service and facilities" at "reasonable and just rates." In addition, the public utility may not abandon, reduce, discontinue or impair service to any community, or portion thereof, without Board approval. IOWA CODE § 476.20. This obligation is not limited to providing transmission and distribution service but includes the provision of electricity itself.

MidAmerican's corresponding rights are largely contained in the service territory statutes. Like its obligations, there is no limiting of its exclusive service territory or rights to mere transmission and distribution. The Board believes the long-term, heavy capital investment traditionally associated with electric utility operations is the fulcrum on which the legislature balanced the rights and obligations expressed in Chapter 476. The customer election hypothesized in the declaratory ruling request undercuts this obligation to commit capital and upsets the balance. The Iowa legislature made the policy decision to displace competition with the regulatory scheme found in Chapter 476. If Iowa is to change to a competitive retail electric environment to respond to changes occurring in the electric industry, statutory changes are required. Presumably, any changes would create a new

balance of rights and obligations for those who provide generation, transmission, or distribution service.

Nothing in the service territory statutes or Chapter 476 limits the application of the service territory laws to transmission and distribution. In fact, the language itself commands that it apply to the supply of electricity. For example, IOWA CODE § 476.23(2) states that "[a]n electric utility shall not construct or extend facilities *or furnish electric service* to a prospective customer not presently being served, . . ." (emphasis added). If the service territory statutes applied only to transmission and distribution, the words "or furnish electric service" would be unnecessary because the phrase "construct or extend facilities" would cover transmission and distribution lines. "Electric service" as used throughout the service territory statutes means something more, and that something more is the supply of electricity.

The answer to MidAmerican's first question is therefore that the Board's assignment of an exclusive area of service to MidAmerican does give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within its assigned area of service. The sale or provision of electricity includes generation, transmission, and distribution.

The answer to the second question posed by MidAmerican follows from the first. Based on IOWA CODE chapter 476, and in particular the legislative intent articulated in IOWA CODE § 476.25, the Board anticipates MidAmerican would decline such a request for direct access or retail wheeling. Declining such requests is consistent with Iowa's statutory regulatory scheme.

The Board notes that the service territory statutes do contain provisions for changes. IOWA CODE § 476.25. However, both before and after the change, only one utility provides service to the customer. The customer's service is not split between a generation provider and a transmission and distribution provider. Also, any changes or modifications

to utilities' service territories must be approved by the Board to ensure compliance with the legislature's intent in enacting Chapter 476 and, in particular, the service territory statutes.

The Board's responses to the first two questions are consistent with its decision in *Lambda Energy Marketing Company, LLC v. IES Utilities Inc.*, Docket No. FCU-96-8 (August 25, 1997). There, the Board found a proposal by an energy marketer to offer backup or standby generation to a utility's interruptible customers violated Iowa's exclusive service territory laws. The energy marketer's proposal was even more limited than the hypotheticals posed in the request for declaratory ruling. In *Lambda*, the utility would have continued to provide power except at such times as the utility interrupted the customer. Even this limited retail wheeling was found to violate Iowa's exclusive service territory statutes.

In response to the third question, the two alternative forms of the transaction posed achieve the same result and the Board's responses to questions 1 and 1 are the same for either alternative. There is no substantive distinction, for purposes of this ruling, between direct access or retail wheeling and a buy-sell transaction undertaken at the direction of a retail customer where the utility is simply an intermediary providing transmission and distribution.

As a footnote, North Star argued the questions posed in the declaratory ruling are more appropriate for resolution in federal court. The Board rejects that argument. As the agency charged by statute with utility regulation, the Board is the appropriate body to rule on questions such as those posed in MidAmerican's request for declaratory ruling. To decline to rule on such questions would be an abrogation of the Board's statutory duties and responsibilities.

IT IS THEREFORE ORDERED:

1. The request for declaratory ruling filed by MidAmerican Energy Company on April 1, 1998, is granted to the extent discussed in this order.

2. Any argument in the pleadings not specifically addressed in this order is rejected as not being of sufficient persuasiveness to warrant comments.

UTILITIES BOARD

/S/ Allan T. Thoms

ATTEST:

/S/ Emmit J. George, Jr.

/S/ Raymond K. Vawter, Jr.
Executive Secretary

/S/ Paula S. Dierenfeld

Dated at Des Moines, Iowa, this 29th day of May, 1998.

APPENDIX E

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

DOCKET NO. DRU-98-1

IN RE:

MIDAMERICAN ENERGY COMPANY

ORDER APPROVING MARKET ACCESS SERVICE PILOT PROJECT

(Issued August 21, 1998)

I. INTRODUCTION

On September 5, 1997, MidAmerican Energy Company (MidAmerican) filed with the Utilities Board (Board) a proposed Market Access Service (MAS) pilot project. The MAS project was based on the pilot project outlined in the settlement approved by the Board on June 27, 1997, in Docket No. APP-96-1. Under the proposed MAS, industrial and large general service customers would be allowed to select their electric power supplier. MidAmerican would continue to provide transmission and distribution services. The proposed MAS program would last seven years, but would terminate earlier if direct access is made more broadly available sooner.

In the first year, MidAmerican will make 60 MW of load eligible for MAS, increasing that amount by 15 MW each subsequent year. Put another way, approximately 9 percent of MidAmerican's industrial load will initially be available for MAS. By MAS's seventh year, approximately 22 percent of the industrial load will be available for participation. MAS will be offered in two phases. In the first, lasting two years,

MAS participants must commit 4 to 10 MW of load at a single site. For the second phase, the minimum load at a single site drops to 2 MW, with a maximum total aggregated load per participant of 10 MW. If potential participants exceed the MAS limits, a lottery will be used.

Under the MAS proposal, Mid American's rates will be unbundled. Transmission rates and ancillary service charges will initially be based on MidAmerican's open access transmission tariff approved by the Federal Energy Regulatory Commission (FERC). MidAmerican's transmission charges will be paid directly by MAS participants, or by designated power coordinators acting on their behalf. MidAmerican's distribution rates will be paid directly by MAS customers.

MidAmerican proposes to recover administration costs from MAS participants. Stranded costs caused by MAS, in the form of lost revenues, will be recovered by MidAmerican from participants through a market participation charge. This charge declines each year and is zero in years 6 and 7.

Under MidAmerican's proposal, it maintains ownership and control of metering and meter reading. MidAmerican will also make emergency backup service available. Suppliers and marketers must belong to a North American Electric Reliability council (NERC) regional reliability council to participate and would be responsible for end-use load reporting. MidAmerican will participate in MAS as a supplier through its retail power supply function but will not offer itself discounts that are not offered to other MAS suppliers.

The MAS proposal requires reciprocity from other MAS suppliers that are utilities or utility affiliates. Under the proposal, MidAmerican will allow another utility or its affiliate to serve a MidAmerican customer only if the other utility allows MidAmerican to serve the same customer of comparable size in the other utility's service territory. If an Iowa utility is involved, there is the additional requirement

that MidAmerican be allowed to serve a percentage of the utility's load comparable to the percentage of MidAmerican load served under MAS.

II. PROCEDURAL HISTORY

In addition to the Consumer Advocate Division of the Department of Justice (Consumer Advocate), the following parties intervened in this proceeding: QST Energy Trading Company (QST Trading), QST Energy Inc. (QST Energy), the Iowa Industrial Intervenors (III), PAM Natural Gas (PAM), Enron Capital & Trade Resources Corporation (Enron), and the Iowa Association of School Boards (IASB). Two power marketers, Iatan Power Partners, L.P., and LS Power, LLC, were granted limited intervenor status to participate in a hearing regarding a discovery dispute. The discovery dispute was resolved by Board orders issued December 17, 1997, and January 22, 1998. Because of the delay in these proceedings caused by the discovery dispute, the Board issued an order extending the ten-month deadline, if applicable, on July 2, 1998.

Hearings were held on February 24 and 25, 1998. Parties were given the opportunity to file initial and reply briefs. MidAmerican filed a motion to strike certain portions of Enron's brief and the entire brief filed by the IASB on March 27, 1998. That motion will be ruled upon this order.

In addition to the motion to strike, the following issues will be addressed:

1. Whether MidAmerican's Market Participation Charge and factor "CE" are reasonable.

2. Whether tariff sheets for the Market Participation Charge and administration fee (Sheets M-15 and M-16) are unreasonably vague.

3. Whether MidAmerican's reciprocity requirements are reasonable.

4. Whether MAS suppliers should be required to relieve MidAmerican of MAPP load reporting responsibility for supplier customer loads, either through NERC reliability council membership or any alternative acceptable to MAPP.

5. Whether MidAmerican should be required to renegotiate APP flexible-rate contracts to allow MAS participation.

6. Whether MidAmerican should be required to adopt an MAS Code of Conduct.

7. Whether the MAS tariff should include a standard form of contract.

8. Whether MAS participation should be conditioned on customers providing information needed for MidAmerican reporting requirements.

9. Whether MidAmerican should be required to conduct a full rate unbundling study for Phase 2 of the MAS program.

III. MOTION TO STRIKE

On March 27, 1998, MidAmerican filed a motion to strike certain portions of Enron's brief and the entire brief filed by IASB. MidAmerican claimed in its motion the briefs contained factual assertions which it did not have an opportunity to cross-examine at hearing.

The Board believes the disputed briefs contain largely policy arguments or statements that can be better characterized as statements of intent rather than statements of fact. The Board will deny the motion to strike. The Board will ignore any facts alleged in Enron's brief if different from the record in the case.

MidAmerican also filed a motion to compel discovery against QST. Counsel for MidAmerican has indicated QST subsequent production rendered this motion moot.

IV. DISCUSSION

1. Market Participation Charge and Factor "CE"

MidAmerican proposed to recover stranded costs caused by the MAS, in the form of lost revenues, from MAS participants through the market participation charge. This charge would decline on an annual basis. Under the market participation charge, MidAmerican would recover 100 percent of lost revenues the first year of the pilot project, 80 percent the second, 60 percent the third, 40 percent the fourth, and 20 percent the fifth. There would be no market participation charge in years six and seven.

There was much discussion about modification of the formula to determine the market participation charge, particularly factor "CE," which represents the value of capacity and energy released by the MAS participant for resale by MidAmerican. MidAmerican used its average historical wholesale sales as a proxy to determine an estimated resale value of capacity and energy. Other parties, particularly III, argued average wholesale sales revenues may not be an appropriate proxy and that MidAmerican should divide its wholesale sale into firm and interruptible sales and apply the average firm wholesale price to firm MAS customers.

The "CE" factor is important because the higher the value of released capacity and energy, the lower the market participation charge. While no party objected to the concept of a market participation charge, if the charge is too high, participation in the pilot project is discouraged.

It is difficult, if not impossible, for the Board to determine an appropriate proxy to determine the value of capacity and energy which will be released in the future. Also, because this is a voluntary pilot, there are questions whether MidAmerican would proceed with the pilot if the market participation charge were rejected or the formula for determining the charge modified.

The Board is concerned, however, that the market participation charge will discourage participation in the plan. While the Board will accept MidAmerican's market participation charge and formula for purposes of the pilot project, the Board strongly urges MidAmerican to consider the option of creating a deferred account to record the market participation charge. That way, the charge would not be recovered contemporaneously from pilot participants, which would remove a barrier to plan participation. MidAmerican could seek recovery of the deferred amounts in a subsequent proceeding.

The Board recognizes MidAmerican has a great deal at stake in this voluntary pilot. MidAmerican's public statements support retail choice in Iowa. Because of MidAmerican's stated commitment to designing a successful industrial pilot, the Board believes it is appropriate to give MidAmerican the option of going forward as proposed or modifying its tariff to record the market participation charge in a deferred account.

2. Tariff Sheets

III and Consumer Advocate argued MidAmerican's market participation charge formula and administration fee are unreasonably vague. They contended the tariff does not correctly describe the methodology used to derive the capacity and energy value used in the market participation charge formula, making it impossible for a customer to determine its individual charge. III and Consumer Advocate pointed out the amount of the market participation charge is an important factor for a potential MAS participant to know before committing to the pilot project. Similarly, III and Consumer Advocate argued potential participants could not determine the monthly administration fee from the tariff and that MidAmerican indicated this charge could range from $194 to $2,919 per month. (Tr. 290).

MidAmerican offered to cap the monthly administration fee for the first year at $433.06 per month. (Ex. 5;

MidAmerican reply brief, p. 22). The fee could be lower, depending on the number of participants, and revisions would be filed annually for Board approval. This is a reasonable solution. The fee is based on the number of participants and, therefore, could go down if more customers participate, but the fee cap gives potential participants a known figure to use in making their decision to participate. MidAmerican will be required to amend its tariff sheet M-16 specifying the fee cap.

The Board agrees the market participation charge in the tariff formula needs to be clarified so potential participants may compute their charge. MidAmerican will be required to amend its tariff sheets to explain 1) how customer bills under bundled rates, factor "B," are computed for partial loads committed to MAS, and 2) how the values of capacity and energy, factor "CE," are determined, including the specific capacity and seasonal energy values computed. (Tr. 248-53; Ex. 4). Like the administration fee, revisions will be required to be filed annually with the Board for approval.

3. Reciprocity

The MAS proposal allows another utility or its affiliate to serve a MidAmerican customer only if the other utility allows MidAmerican to serve similar-sized facilities of the same customer in the other utility's service territory. If the other utility is an Iowa utility, the MAS proposal provides MidAmerican must also be allowed the opportunity to serve load in the other utility's service territory, comparable to the total percentage of MidAmerican load served through MAS. MidAmerican contended that without reciprocity, its long-term competitive position will be disadvantaged because other utilities will be able to establish a market presence in MidAmerican's territory before MidAmerican can establish a similar presence in the other utilities' service territories.

Consumer Advocate, III and QST opposed the reciprocity requirements. These parties argued reciprocity might limit the number of potential suppliers and, therefore, not accurately reflect a competitive market.

The Board finds the reciprocity requirements are reasonable for this pilot project. The reciprocity requirements are limited and, for out-of-state utilities or affiliates, only apply if the same customer is involved. Because the restrictions are narrowly drawn and are greater on in-state utilities, the Board does not believe the reciprocity provisions violate the Commerce Clause.

Contrary to the assertions of intervenors, the Board believes the reciprocity provisions create a more accurate representation of a competitive market for purposes of this pilot. In a competitive market, a seller always has the potential of adding new customers, but a seller also always has the risk of losing existing customers. Without reciprocity, MAS suppliers only have the potential of adding new customers — there is no risk of losing existing customers. In addition, customers benefit from reciprocity because both MidAmerican and other suppliers have the potential to aggregate same-customer load and offer lower prices.

MidAmerican stated that, for in-state utilities, reciprocity means allowing MidAmerican to serve a comparable percentage of load, not a comparable MW amount. (Tr. 29-30). However, tariff sheet M-9 does not clearly convey this meaning. MidAmerican will be required to amend the tariff to reflect that "comparable" refers to percentage of load rather than MW amounts.

4. Load Reporting Requirements

MidAmerican urged that suppliers be required to become full members of a NERC reliability council so that suppliers will assume NERC end-use load responsibility for the load they serve, freeing MidAmerican from this responsibility with its reliability council, the Mid-Continent Area Power Pool (MAPP). This will allow MidAmerican to resell the capacity and energy it must otherwise maintain to serve these loads. MidAmerican pointed out the Market Participation Charge is reduced by sales of released capacity and energy in the wholesale market.

QST questioned whether full NERC reliability council membership was necessary to relieve MidAmerican of NERC end-use load responsibility. QST argued the cost of full membership in MAPP or another NERC reliability council would discourage suppliers from entering the market. Consumer Advocate also argued alternatives to full reliability council membership should be explored.

No one opposed relieving MidAmerican of its end-use load reporting responsibility for loads served by other suppliers. The only issue is whether full membership in MAPP or another NERC reliability council is required for this to be accomplished. The record in this case does not answer the question, but there are indications full membership may not be necessary. Therefore, MidAmerican will be required to revise its tariff to require suppliers to meet only MAPP-imposed requirements necessary to relieve MidAmerican of load reporting responsibility for loads served by other suppliers. The Board does not want to impose any requirements greater than those required by MAPP.

5. Renegotiation of APP Contracts

Pursuant to the settlement approved by the Board in Docket No. APP-96-1, MidAmerican has been able to negotiate long-term contracts with several potential MAS candidates. (Tr. 298, 301). Consumer Advocate and QST argued these customers did not have the option of considering MAS and that, to level the playing field, all customers who signed these long-term contracts should be allowed to renegotiate their contracts and participate in MAS.

To accommodate these concerns, MidAmerican stated it will offer to renegotiate any long-term contract entered into pursuant to the Docket No. APP-96-1 settlement and allow for MAS participation by mutual agreement. (MidAmerican reply brief, p. 11). This is acceptable to the Board, with one caveat. MidAmerican will be required to inform these contract holders of this option.

6. MAS Code of Conduct

QST, ENron, and Consumer Advocate all argued that MidAmerican should be required to adopt a strict code of conduct. While the parties all urged their own individual variations of what should be required, in general all agree that MidAmerican should be prohibited from taking advantage of utility information not generally available to all suppliers.

Proposed tariff sheet M-25 deals with separation of functions, but is not a code of conduct. MidAmerican stated it should be required to use the same code of conduct as the Board adopted on February 10, 1998, in Docket No. NOI-95-1 as part of the guidelines for MidAmerican's proposed residential and commercial pilot. (Tr. 119). The Board believes this code of conduct addresses most of the other parties' concerns, provides consistency between the two pilots, and ensures MidAmerican as a power supplier will not gain unfair competitive advantage over its competitors. The Board will require MidAmerican to amend tariff sheet M-25 to add the code of conduct adopted in Docket No. NOI-95-1.

7. Standard Form of Contract

MidAmerican plans to use a "fill-in-the-blank" contract format to provide flexibility to address customer-specific needs without the necessity to make tariff changes. A draft form of contract was provided at the hearing. (Ex. 6). III argued the contract terms were vague and a standard MAS form contract should be submitted for Board approval. Absent contract approval, III feared MidAmerican might go beyond the MAS tariff in its contracts.

The contracts signed must comply with the provisions of the MAS tariff. However, allowing some flexibility to address customer-specific needs is desirable. The Board will not require a draft contract form to be submitted for approval, but will require that MidAmerican provide a copy of the MAS tariff to each customer considering MAS participation prior to that customer signing a MAS contract. This will provide an

additional safeguard to ensure contracts are consistent with the tariff.

8. Reporting Requirements

MidAmerican proposed to provide information to the Board and Consumer Advocate, on a periodic basis, so that the success of MAS in terms of customer savings and participation could be evaluated. (Tr. 24-26). However, as noted by Consumer Advocate, some of this information must come from MAS participants. Consumer Advocate suggested MAS participation be conditioned on participants providing the necessary information to MidAmerican. This information would then be provided to the Board and Consumer Advocate on a confidential basis.

The Board agrees customer information is necessary to evaluate the success of MAS. None of the parties oppose Consumer Advocate's proposal. MidAmerican will be required to amend its tariff to reflect this requirement and also to specify the information it has committed to provide. (Tr. 24-26).

9. Rate Unbundling

MidAmerican used 1995 data to arrive at distribution rates. Consumer Advocate does not oppose these rates for Phase 1 of MAS because it is of limited duration. However, for Phase 2 of MAS, which begins in two years, Consumer Advocate argued MidAmerican should conduct a full rate unbundling study for all customer classes, not just MAS customers. (Tr. 173-75). This unbundling study should be based on a complete class cost-of-service study using current available data.

Consumer Advocate's request does not appear to conflict with MidAmerican's position since it would only unbundle rates for MAS participants. (Tr. 245-46). The Board agrees that such a study would be useful for Phase 2 and will result in distribution rates more reflective of current costs.

V. FINDINGS OF FACT

Based on a thorough review of the entire record in these proceedings, the Board makes the following findings of fact:

1. It is reasonable to accept MidAmerican's market participating charge and formula for computing the charge, but to give MidAmerican the option of creating a deferred account to reflect these charges rather than collecting them contemporaneously from MAS participants.

2. It is reasonable to cap the monthly administration fee at $433.06 and to clarify the market participation charge formula so potential participants may compute their charge.

3. It is reasonable to approve the proposed reciprocity requirements.

4. It is reasonable to relieve MidAmerican of end-use load reporting responsibility for loads served by other suppliers and require suppliers to meet MAPP-imposed requirements necessary to relieve MidAmerican of this responsibility.

5. It is reasonable to accept MidAmerican's offer to renegotiate long-term contracts entered into pursuant to Docket No. APP-96-1 and to require MidAmerican to inform contract holders of this option.

6. The code of conduct adopted by the Board on February 10, 1998, in Docket No. NOI-95-1 is a reasonable code of conduct for this pilot.

7. It is not reasonable to require a standard MAS contract form, but it is reasonable to require that MidAmerican provide each customer a copy of the MAS tariff prior to that customer signing any MAS contract.

8. It is reasonable to require MidAmerican to provide pilot information to the Board and Consumer Advocate on a periodic basis and to condition MAS participation on the participants supplying certain information to MidAmerican necessary for pilot evaluation.

9. It is reasonable to require a full rate unbundling study for all customers classes for Phase II of MAS that would only unbundle rates for MAS participants.

VI. CONCLUSIONS OF LAW

The Board has jurisdiction of the parties and the subject matter in this proceeding, pursuant to IOWA CODE ch. 476 (1997).

VII. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. TF-97-229 is approved, subject to the modifications required by this order. MidAmerican shall file compliance tariffs within 30 days to reflect those modifications. The compliance tariffs will be effective upon approval by the Board.

2. MidAmerican shall provide an eligible MAS participant with a copy of the MAS tariff prior to an MAS contract being signed.

3. MidAmerican shall inform eligible MAS participants who entered into a long-term contract pursuant to Docket No. APP-96-1 of MidAmerican's contract renegotiation offer which would allow for MAS participation.

4. Motions and objections not previously granted or sustained are denied or overruled. Any argument in the briefs not specifically addressed in this order is rejected either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comments.

UTILITIES BOARD

/S/ Allan T. Thoms

ATTEST:

/S/ Emmit J. George, Jr.

/S/ Raymond K. Vawter, Jr.
Executive Secretary

/S/ Paula S. Dierenfeld

Dated at Des Moines, Iowa this 21st day of August, 1998.

Supreme Court, U.S.
FILED
NOV 4 1999
OFFICE OF THE CLERK

No. 99-581

IN THE
Supreme Court of the United States

NORTH STAR STEEL COMPANY,
Petitioner,

v.

MIDAMERICAN ENERGY HOLDINGS COMPANY
and MIDAMERICAN ENERGY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 4, 1999

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QUESTIONS PRESENTED

Did the court of appeals correctly apply the "state action" doctrine in holding MidAmerican's alleged anti-competitive conduct immunized from federal antitrust claims by reason of (1) Iowa's clearly articulated and affirmatively expressed state policy displacing retail competition with regulation in the provision of retail electric service and (2) Iowa's active supervision of that policy?

LIST OF PARTIES

All parties to the proceeding below are listed in the caption. The Iowa Utilities Board participated in the proceedings below as *amicus curiae*.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent MidAmerican Energy Company is a wholly owned subsidiary of MHC, Inc. MHC, Inc. is a wholly owned subsidiary of MidAmerican Funding, LLC, which is in turn wholly owned by respondent MidAmerican Energy Holdings Company, a publicly held company.

Respondent MidAmerican Energy Holdings Company has no parent company. No publicly held company owns 10 percent or more of the stock of MidAmerican Energy Holdings Company. However, on October 25, 1999, an investor group including Berkshire Hathaway, Inc. and other private investors announced that it had reached a definitive agreement to acquire MidAmerican Energy Holdings Company. The transaction is expected to be completed by April of 2000. After the transaction, Berkshire Hathaway, Inc. will own approximately 75 percent of MidAmerican Energy Holdings Company on a fully diluted basis. *See* MidAmerican Energy Holdings Company, Current Press Releases, *Berkshire Hathaway, Walter Scott and David Sokol to Acquire MidAmerican Energy Holdings* (Oct. 25, 1999), *accessed at* <http://www.midamerican.com/html/news_industry1.shtml>.

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IN THE

Supreme Court of the United States

No. 99-581

NORTH STAR STEEL COMPANY,
Petitioner,

v.

MIDAMERICAN ENERGY HOLDINGS COMPANY
and MIDAMERICAN ENERGY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MidAmerican Energy Holdings Company and MidAmerican Energy Company (collectively, "MidAmerican") respectfully file this brief in opposition to the petition of North Star Steel Company ("North Star") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 184 F.3d 732 (8th Cir. 1999). The opinion of the district court can be found at No. 4-97-CV-80782, 1998 U.S. Dist. LEXIS 22332 (S.D. Iowa June 23, 1998). The opinions of the court of appeals and the district court are set out in Appendix A and Appendix B, respectively, of the Petition.

JURISDICTION

The court of appeals entered its judgment on July 7, 1999. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

In addition to the statutes listed in the Petition ("Pet."), the following statutory and regulatory provisions are involved in the case:

Iowa Code § 476.8 provides in relevant part:

> Every public utility is required to furnish reasonably adequate service and facilities. . . . The charge made by any public utility for any heat, light, gas, energy efficiency and renewable energy programs, water or power produced, transmitted, delivered or furnished, . . . or for any service rendered or to be rendered in connection therewith shall be reasonable and just . . . .

Iowa Code § 476.20(1) provides in relevant part:

> 1. A utility shall not, except in cases of emergency, discontinue, reduce, or impair service to a community, or a part of a community, except for nonpayment of account or violation of rules and regulations, unless and until permission to do so is obtained from the board.

Iowa Code § 476.23(1) provides in relevant part:

> 1. An electric utility shall not construct or extend facilities or furnish or offer to furnish electric service to the existing point of delivery of any customer already receiving electric service from another electric utility without having first filed with the board the express written agreement of the electric utility presently serving this customer, except as otherwise provided in this section . . . .

Iowa Code § 476.25 provides in relevant part:

> It is declared to be in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis. Except for good cause expressed through formal public statement, the board shall establish these exclusive service areas on or before July 1, 1979. . . .
>
> 1. The service area boundaries . . . may be modified by the board to promote the public interest, to preserve existing service areas and electric utilities' rights to serve existing customers, and to prevent unnecessary duplication of facilities, to take account of natural and physical barriers which would make electric service beyond these barriers uneconomic and impractical and those boundaries shall be modified by the board to take account of the contracts between electric utilities which have been approved by the board. . . . The board, on its own motion or at the request of an electric utility or municipal corporation, after notice and opportunity for hearing, may modify the boundaries of an electric utility exclusive service area which it has previously established if this modification, including consideration of the factors noted in this subsection, is found to be in the public interest.
>
> * * * *
>
> 3. An electric utility shall not serve or offer to serve electric customers in an exclusive service area assigned to another electric utility, nor shall an electric utility construct facilities to serve electric customers

> in an exclusive service area assigned to another electric utility. . . .

Iowa Code § 476.53 provides in relevant part:

> The board shall not allow a return on common equity on that portion of a public utility's electric generating capacity which is determined to be excess electric generating capacity. Excess electric generating capacity is that portion of the public utility's electric generating capacity which exceeds the amount reasonably necessary to provide adequate and reliable service as determined by the board.

Iowa Code § 476A.2(1) provides in relevant part:

> 1. Commencing January 1, 1977, a person shall not commence to construct a facility except as provided in section 476A.9 unless a certificate for the facility has been issued by the board . . . .

Iowa Administrative Code rr. 199-24 is set out in Respondents' Appendix attached to this brief.

STATEMENT OF THE CASE

The pertinent factual background is more fully set out in the opinion of the court of appeals. (Pet. App. A 2a-6a.)

In brief, North Star alleges that MidAmerican violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1994), by refusing to enter into agreements with North Star whereby North Star could purchase electric power for its Wilton, Iowa mill from retail suppliers other than MidAmerican.[1] MidAmerican moved to dismiss the

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[1] North Star proposed two alternate forms that the transaction could take: (1) North Star could "purchase directly power produced by a third party generator" and have MidAmerican distribute the power to North Star over MidAmerican's transmission lines; or

complaint in the district court on the ground that Iowa's pervasive regulation of retail electric service immunized it from liability for the alleged anticompetitive conduct under the "state action" doctrine enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases.

After initial argument on the motion to dismiss, MidAmerican filed a petition for declaratory ruling from the Iowa Utilities Board ("IUB") concerning MidAmerican's rights and obligations pursuant to the Iowa Code provisions regarding the supply of retail electric service. (Pet. App. A 4a.) Among other questions, MidAmerican asked:

> 1. Does the Board's assignment of an exclusive service area to MidAmerican, pursuant to Iowa Code §§ 476.22 through 476.26 and related sections, give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within the assigned service area, or are MidAmerican's rights and obligations limited to the transmission and distribution of electricity that may be provided competitively by other sellers to retail customers?

(Pet. App. D 21a.) North Star filed comments in opposition to the petition, while the Office of Consumer Advocate, a division of the Iowa Department of Justice, filed a response concurring with MidAmerican's position. (Pet. App. D 19a-20a.)

Following a hearing, the IUB issued a Declaratory Ruling in which it held that retail electric service under Iowa's exclusive service territory statutes includes the supply of electricity, as well as transmission and distribution func-

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(2) MidAmerican could "purchase power from a third party expressly for transmission to North Star's mill." (Pet. App. A 3a.)

tions. *In re MidAmerican Energy Co.*, Docket No. DRU-98-1 (I.U.B. May 29, 1998) ("IUB Declaratory Ruling"). (Pet. App. D 23a.) The IUB further held that MidAmerican's obligation to provide "reasonably adequate" service at "reasonable and just" rates to retail customers within its assigned exclusive service territory, Iowa Code § 476.8, carried with it a corresponding right to provide such service—including the supply of electricity—on an exclusive basis. (Pet. App. D 23a-24a.) The IUB described exclusivity of electric service as a deliberate choice that the Iowa General Assembly had made in order to induce the capital investment necessary for utilities to provide reliable electric service to retail consumers. (Pet. App. D 23a.) Accordingly, the IUB held that MidAmerican's denial of proposals such as North Star's was proper and expected.[2] (Pet. App. D 24a.)

North Star appealed the IUB Declaratory Ruling to the Iowa state district court, which affirmed the ruling. *North Star Steel Co. v. Iowa Utils. Bd.*, No. AA3127 (Iowa Dist. Ct. Jan. 29, 1999). North Star has in turn appealed that ruling to the Iowa Supreme Court. *North Star Steel Co. v. Iowa Utils. Bd.*, No. 99-0342 (Iowa appeal docketed Mar. 5, 1999).

On June 23, 1998, the district court below (Wolle, J.) granted summary judgment to MidAmerican. On appeal, the Eighth Circuit Court of Appeals affirmed. The court of appeals held that, under Iowa law, preclusive effect must be given to the prior Iowa state court determination that the assignment of exclusive service territories by the IUB includes generation, and that utilities such as MidAmerican therefore have the exclusive right to sell elec-

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[2] The IUB found that the alternate forms of transaction proposed by North Star made no difference to these conclusions. (Pet. App. D 25a.)

tricity in their assigned service areas. (Pet. App. A 8a-10a.)

The court of appeals went on to hold that "the exclusive service territory statute is explicit state authorization for displacing competition in both the distribution and generation of retail electric service" and that "the Board has continued to implement the state policy of displacing competition by assigning new customers to exclusive service providers and determining the assigned exclusive service provider in cases of doubt or conflict." (Pet. App. A 11a, 12a.) Accordingly, the court of appeals held that the district court had not erred in finding both prongs of the state action doctrine to be satisfied and in granting summary judgment to MidAmerican. (Pet. App. A at 13a.)

REASONS FOR DENYING THE WRIT

I. THE STATE OF IOWA'S REGULATION OF RETAIL ELECTRIC SERVICE SATISFIES BOTH PRONGS OF THE TEST FOR APPLICATION OF THE "STATE ACTION" DOCTRINE

The "state action doctrine" immunizes a private party from liability under the federal antitrust laws if (1) the private party acts pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition, and (2) the state has "actively supervised" discretionary conduct by private parties undertaken pursuant to the clearly articulated state policy. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

The State of Iowa's control of the provision of retail electric service satisfies both prongs of the state action test. In 1977, the Iowa General Assembly declared the establishment of exclusive electric service areas to be in

the public interest and directed the Iowa State Commerce Commission (predecessor to the current IUB) to establish a system of exclusive retail electric service territories. Iowa Code § 476.25. The same statute provides that an electric utility cannot "serve or offer to serve electric customers in an exclusive service area assigned to another electric utility" or construct facilities to provide such service. Iowa Code § 476.25(3). Likewise, the construction of facilities or furnishing of electric service to "the existing point of delivery of any customer already receiving electric service from another electric utility," without the express written consent of that utility, is forbidden. Iowa Code § 476.23(1). These provisions constitute a clear determination by the State of Iowa to displace competition in the provision of retail electric service with a system of exclusive service territories.[3]

The structure of exclusive retail service territories, including exclusivity in the supply of electricity, is central to Iowa's regulation of retail electric service. For example, Iowa Code § 476.8 requires each utility to furnish "reasonably adequate service and facilities" at "reasonable and just" rates. "Adequate service and facilities" include sufficient generating capacity to supply the utility's service area.[4] However, capacity that "exceeds the amount reasonably necessary to provide adequate and reliable service" is "excess electric generating capacity"; the utility is

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[3] As MidAmerican demonstrated before the district court and court of appeals, this statutory system was adopted to replace a prior system that permitted utilities to compete for customers. Pet. App. A 3a.)

[4] *Id.*; *see also* IUB Declaratory Ruling. (Pet. App. D 23a.) In addition, Iowa Code § 476.20(1) provides that no utility may abandon, reduce, discontinue or impair service to any community or part of a community without prior Board approval.

not allowed a return on common equity on such capacity.[5] The sufficiency of capacity (or the existence of excess capacity) can only be determined in light of the utility's retail service obligation.[6]

Similarly, persons seeking to construct new generation facilities with a capacity of 25 megawatts or more must obtain a certificate of public convenience, use and necessity from the IUB. Iowa Code § 476A.2(1). The current and projected future demand for power in the exclusive service areas of the participants proposing to construct or purchase power from a proposed generating facility are key factors in the IUB's consideration of an application for a certificate. *See* Iowa Admin. Code rr. 199-24.4(3)-(4). (Respondents' App.)

Courts have found an intent to displace competition in even less comprehensive enactments. In *Municipal Utils. Board v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991), *cert. denied*, 513 U.S. 1148 (1995), Alabama legislation establishing exclusive service territories permitted some competition for large industrial customers. *Fuchs v. Rural Elec. Convenience Co-op., Inc.*, 672 F. Supp. 1111 (C.D. Ill. 1987), *aff'd*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), involved a statute similar to Iowa's, except that the utilities themselves were authorized to determine the exclusive service areas in the first instance by agreement (failing which, the Illinois Commerce Commission would make the deter-

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[5] Iowa Code § 476.53. *See also Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 419 N.W.2d 373, 375-76 (Iowa 1988); *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 412 N.W.2d 600, 604-05 (Iowa 1987); *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 347 N.W.2d 423, 427-30 (Iowa 1984).

[6] *See Consumer Advocate*, 419 N.W.2d at 375-76; *Iowa-Illinois*, 412 N.W.2d at 604-05; *Iowa-Illinois*, 347 N.W.2d at 427-30.

mination). In *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996), exclusive service territories were voluntarily negotiated by the utilities concerned, not assigned by the State of Florida. In each of these cases, the courts found clear articulation of a state policy to displace competition by means of exclusive service territories and found the alleged anticompetitive conduct immunized by the application of the state action doctrine. *Alabama Power Co.*, 934 F.2d at 1502; *Fuchs v. Rural Elec. Convenience Co-op, Inc.*, 858 F.2d 1210, 1216 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Praxair*, 64 F.3d at 612.

Active supervision, the second prong of the state action test, is required in order to show that the state, not private parties, has ultimate control in implementing a policy displacing competition. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). In Iowa, the controlling statutes explicitly authorize the state regulatory agency to assign territories for exclusive retail electric service. The Iowa State Commerce Commission, not the utilities, established the exclusive service territories in the first instance. (Pet. App. A 3a.) The IUB has continued to implement the General Assembly's policy of exclusive service areas by assigning new customers to exclusive service providers, modifying assigned territories, and determining the assigned exclusive service provider when doubt or conflict arises. (Pet. App. A 12a.) It must review and approve each change to those territories, whether contested or uncontested by the utilities affected. Iowa Code § 476.25 (1).[7]

[7] MidAmerican supplied the District Court with scores of administrative decisions in which the IUB has applied the exclusive service territory statutes. (JA 136-38, 140-43.)

In the IUB's Declaratory Ruling (Pet. App. D), the agency carefully analyzed the scope of Iowa's exclusive service territory statutes, and held that they "apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission. MidAmerican has a statutory right, and an obligation, to provide electric service to retail customers located within its exclusive service territory." (Pet. App. D 23a). The IUB found that a utility's corresponding rights under the exclusive service territory statutes were not limited to transmission and distribution. Rather, the exclusive service territory statutes represented a legislative balancing of rights and obligations on the "fulcrum" of "the long-term, heavy capital investment traditionally associated with electric utility operations." *Id.* North Star's election of an alternate supplier would undercut the utility's commitment of capital and upset that balance:

> The Iowa legislature made the policy decision to displace competition with the regulatory scheme found in Chapter 476. If Iowa is to change to a competitive retail electric environment to respond to changes occurring in the electric industry, statutory changes are required. Presumably, any changes would create a new balance of rights and obligations for those who provide generation, transmission, or distribution service.

(Pet. App. A 23a-24a.)

In the decision below, the Eighth Circuit Court of Appeals gave preclusive effect to the state district court ruling affirming the IUB's Declaratory Ruling that the exclusive retail electric service territories under the Iowa statutes comprised the supply of electricity as well as distribution and transmission. (Pet. App. A 8a-10a.) North Star's third question (Pet. i) misstates the court of appeals' action, because the court of appeals held that the

state court decision, not the IUB ruling, had preclusive effect. Nowhere in the body of its Petition does North Star suggest that the court of appeals erred in that determination, nor does it offer any reason for this Court to review the determination. Rather, North Star appears to attack the IUB for not having limited the term "retail electric service" to "the distribution of electricity." But North Star's assertion that "the term 'at retail' refers to the distribution function" (Pet. 12) is based solely on an argumentative affidavit submitted by one of its consultants. To the contrary, as the IUB, the district court, and the court of appeals all recognized, "retail electric service" within the meaning of the Iowa statutes comprises the entirety of the service that a public utility provides for its retail customers.

Far from relying on a particular characterization of "industry segments" in the electric industry, as North Star's third question suggests (Pet. i), the IUB, the district court, and the court of appeals simply recognized that Iowa Code § 476.25 "expressly provides that its purpose is to create exclusive service areas which have only one supplier of electricity." (Pet. App. A 10a-11a.) MidAmerican is that retail supplier within its own service territory, and its exclusivity extends to the retail supply of electricity, whether by purchase or from its own generation.

II. There Is No Reason for This Court to Review the Decision of the Court of Appeals

A. The Possibility of Future Retail Deregulation Does Not Negate the Force and Effect of Current Regulation

In arguing that this case is worthy of review, North Star asserts that "[d]ecreased regulation of the electric industry will increase reliance upon the antitrust laws to

preserve competition and it is important, therefore that there be a clear and uniform standard governing the applicability of the 'state action' immunity doctrine." (Pet. 6.) However, North Star mixes its doctrines and confuses deregulation at the wholesale level with deregulation at the retail level. Where regulation does not displace competition in the provision of electricity, or where it no longer does so because of deregulation, the state action doctrine is irrelevant. However, as long as Iowa pervasively regulates retail electric service, including the assignment of exclusive electric service areas, the doctrine will apply precisely because deregulation has not occurred.

North Star insinuates that regulation of *retail* electric service has been displaced by virtue of the deregulation that has occurred at the *wholesale* level of the electric industry. (*See* Pet. 6-7.) That is not the case. Competition to sell power to utilities, including competition among utilities to sell power on the wholesale level, is not the same as competition in the provision of retail electric service.[8]

Wholesale sales are subject to exclusive federal jurisdiction under the Federal Power Act. 16 U.S.C. §§ 824(b), (d), (e) (1994); *see Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986). North Star is a retail electricity customer, and its electric service is subject to regulation by the State of Iowa. Significantly, the Energy Policy Act of 1992, which North Star cites,[9] contains an express prohibition on any Federal Energy Regu-

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[8] For example, *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Case. (CCH) ¶ 63,526, at 76,792 (N.D.N.Y. Sept. 8, 1980) (Pet. 6-7), dealt with a dispute between a municipality and the utility from which it sought to obtain power for resale, *not* the sale of electricity directly from a third-party provider to a retail customer.

[9] (Pet. at 7.)

latory Commission ("FERC") order "which is inconsistent with any State law which governs the retail marketing areas of electric utilities" and on any FERC order requiring retail wheeling of the type North Star seeks here. 16 U.S.C. §§ 824k(g),(h) (1994). Even less to the point are North Star's citations to the Public Utility Regulatory Practices Act, 16 U.S.C. § 824a-3 (1994) ("PURPA"), and Iowa Code § 476.41, each of which deals with cogeneration and similar small power production facilities, and neither of which encourages retail wheeling of the type sought by North Star. Indeed, PURPA expressly bars FERC from authorizing qualifying facilities to make retail sales.[10]

Retail deregulation (also referred to as retail choice) in the electric industry presents issues of policy for state legislatures, including the need to assure that small businesses and families will continue to have access to reliable electric service at reasonable cost; the need to assure that utilities that have made prudent investments in the past to meet consumer needs will be able to recover the costs of those investments; and the effect of deregulation on the environment. In considering these and other issues, states have moved toward deregulation at different speeds and through different programs. The President has proposed legislation to build on this progress, but not to disrupt it or to interfere with the states' processes.[11]

North Star's demands are an effort to end-run the right of the Iowa General Assembly to consider retail choice

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[10] 16 U.S.C. § 824a-3(a) ("Such [FERC] rules may not authorize a qualifying . . . facility to make any sale for purposes other than resale.").

[11] *See* The White House, Office of the Press Secretary, *The Clinton Administration's Comprehensive Electricity Competition Plan* (Mar. 25, 1998), *accessed* at <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1998/3/26/4.text.1>.

legislation on its own terms. North Star's assertions about the importance of the antitrust laws in a deregulated industry puts the cart before the horse. Should Iowa enact retail choice, the antitrust laws will certainly become an important tool for protecting competition. Until that time, however, pervasive state regulation in the provision of retail electric service remains the operative system.

B. This Case Reflects No "Split" Among the Circuits Meriting Review By This Court

North Star also asserts that there is a "split among the federal circuit courts" with respect to the first prong of the state action doctrine, which requires that a state policy displacing competition with regulation be "clearly articulated" and "affirmatively expressed." North Star characterizes this split as one between those courts that have adopted a "foreseeability" standard in which "inference" of a policy is accepted, and those which still require "clear articulation" of a policy pursuant to the *Midcal* standard. (Pet. 8-12.) These claims both mischaracterize the decision below and overstate the extent of any supposed split among circuits. The "split in the circuits" hypothesized by North Star is not presented by this case, and is in any event overstated by North Star.

As an initial matter, the court of appeals did not rely on an inference from ambiguous or unclear statutory language, as North Star asserts. (Pet. 12.) Rather, the court of appeals based its decision on the express language of the Iowa statute, which directly displaces competition with regulation by the establishment of exclusive retail electric service territories, and the preclusive affect of the state court decision affirming the IUB's Declaratory Ruling. As the court of appeals found:

> The state statute expressly provides that its purpose is to create exclusive service areas which have only

> one supplier of electricity. *See* IOWA CODE § 476.25 (1997). [Footnote omitted.] The policy to displace competition in the provision of retail electric service, including the generation of electricity, is unambiguous because the statute has been interpreted to include the generation of electricity. *See In re Mid-American Energy Co.*, Docket No. DRU-98-1, slip op. at 5. Thus, the exclusive service territory statute is explicit state authorization for displacing competition in both distribution and generation of retail electric service.

(Pet. App. A at 10a-11a.) Thus, the court of appeals applied the "clear articulation" test enunciated by this Court, and did not rely not on an impermissible "inference," as North Star contends (Pet. 13). North Star's quarrel is, as it properly should be, with the IUB and the Iowa General Assembly, not with the federal court of appeals.

North Star also asserts that the split is presented by the contrast between *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1688 (1998) and cases such as *Praxair*, 64 F.3d 609. The Petitioner in *Columbia Steel Casting Co.* raised a similar contention last Term, also contrasting *Praxair* and *Columbia Steel Casting Co.* This Court requested briefing by the Solicitor General, who in turn recommended denial of the petition for certiorari, stating that his office "perceive[d] no conflict that calls for resolution by this Court." [12] Specifically, the Solicitor General observed:

> [U]nlike petitioner (Pet. 25), we see no firm basis for concluding that the *Praxair* court would have recognized immunity on the facts of this case, or that

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[12] Brief for the United States as Amicus Curiae at 14, *Columbia Steel Casting Co. v. Portland General Elec. Co.*, No. 97-49, *cert. denied*, 118 S. Ct. 1688 (1998).

> the court below would have rejected a claim of immunity on the facts of *Praxair*.

Id. at 16 (footnote omitted).

The Solicitor General's reference to "the facts of [the] case" is a reminder that cases involving the state action doctrine are heavily dependent on the facts and circumstances of each case. (*See* Pet. 10.) The issues to be decided include whether the state has clearly articulated and affirmatively expressed a policy to displace competition with regulation, whether that policy has been actively supervised by the state, and whether it extends to immunize the particular conduct in question. Because such cases are "fact-bound," Brief for the United States as Amicus Curiae in No. 97-49 at 8, in the absence of significant doctrinal issues, they are not ordinarily appropriate for review by this Court on certiorari. *See also id.* at 11 n.5. North Star has offered no rationale that justifies a grant of certiorari in this case.

North Star's final argument is that the IUB's approval of an experimental program of customer choice somehow demonstrates that Iowa's policy is not "clearly articulated," "affirmatively expressed," or "actively supervised." (Pet. 13-14.) However, the fact that the Board, which has authority to establish exclusive service territories, may also have authority to approve a limited experimental program for the purpose of testing how retail competition might work hardly suggests the absence of a clearly articulated state policy. As this Court has made clear, the state action doctrine should not be construed in a way that unnecessarily reduces the "range of regulatory alternatives available to the State."[13] Likewise the fact that the pro-

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[13] *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) (rejecting argument that state policy must "require, rather than merely permit, anticompetitive conduct" in order for the state action doctrine to apply).

gram—limited in duration and extent—was subject to the IUB's detailed review and approval [14] confirms that the State's policy is, in fact, closely supervised.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 4, 1999

[14] *See* Pet. App. E.

APPENDIX

APPENDIX

IOWA ADMINISTRATIVE CODE rr. 199-24.4(3), (4)

199—24.4(476A) Application for a certificate—contents. Each person or group of persons proposing to construct a facility after January 1, 1977, or a significant alteration to a facility shall file an application for certificate of public convenience, use, and necessity with the board, unless otherwise provided by these rules.

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24.4(3) In section 3, entitled "Current system information," the applicant shall include the following:

a. A specific and complete description of all participants' operating generating units in all participants' operating electric power generating stations. Such description shall include, but shall not be limited to, installed generating capacity including nameplate, net to the busbar ratings and net to the distribution system of each unit in megawatts, primary fuel types and sources for each unit, the heat rate of each unit in BTU/kWh over the range of operating capacity, date placed in service and projected retirement date. Applicant shall also describe all other sources of electricity available to serve participants' service area. Description of other sources of electricity shall include, but shall not be limited to, total kilowatts and kilowatt hours available in each quarter of the year. For this purpose, a group of several similar generating units operated together at the same location such that segregated records of energy output are not available shall be considered as a single unit.

b. For each quarter of the ten (10) years preceding the date of application, system load level information in the form of duration curves, load curves and integrated energy curves. Supporting data for each curve shall be supplied in tabular form.

c. For each quarter of the ten (10) years preceding the date of application, in each participant's service area, the number of customers in each customer class, the average customer consumption in each customer class and the average price per kilowatt hour for each customer class. Data for the largest industrial users shall be further classified according to two digit Standard Industrial Classification (SIC) Codes. Applicant must indicate whether any information provided under this subsection constitutes a clearly unwarranted invasion of personal privacy or trade secrets required to be kept confidential by the board under the Iowa Administrative Procedure Act. Applicant shall provide capital costs and operating and maintenance expenses per kilowatt hour by generating station for each quarter of the ten (10) years preceding the date of application.

d. For purposes of this subsection, the period chosen for presentation of quarterly data shall be any appropriate three (3)-month interval, selected on the basis of the shape of the load curve or any other load characteristics of the installed generating capacity.

24.4(4) *In section 4, entitled "Future system projections," the applicant shall include the following:

a. (1) A description of each participant's projected installed generating capacity for each year from the date of application through the proposed facility's life. Such description shall include but not be limited to the primary type of fuel projected to be used by each generating unit in the system and the proportion each generating unit is projected to contribute to total installed generating capacity.

*** Objection, see filed rules published IAC Supp. 1/9/77, 5/4/77, 7/13/77.**

(2) A description of other sources of electricity available or likely to be available to supply participants' service areas. Such description shall include, but shall not be limited to, total kilowatts and kilowatt hours available for each year from the date of application through the proposed facility's life.

b. (1) Identification and description of participants' existing and planned programs designed to conserve energy. Such description shall include, but shall not be limited to, estimated kilowatt hours saved for each year from the date of application through the proposed facility's life.

(2) An analysis of the effect construction of the facility would have on the demand for electricity. This analysis shall include, but shall not be limited to, all anticipated changes in demand due to community developments induced by construction of the facility.

(3) An identification of the forecast methodology used by applicant including a discussion of the analytical techniques used, the manner in which the techniques are related to the forecast, and the confidence levels and expected range of accuracy for the components of the forecast.

(4) A projection of system load levels in the form of duration curves, load curves and integrated energy curves, for each year from the date of application through the proposed facility's life. Supporting data for each curve shall be supplied in tabular form.

c. For each participants' service area, a projection of the number of customers in each customer class, average customer consumption by customer class and average price per kilowatt hour for each year from the date of application through the proposed facility's life. Applicant shall provide projections of capital costs and operating

and maintenance costs per kilowatt hour for each station in the participants' system and for the proposed facility for each year from the date of application through the proposed facility's life. Average price per kilowatt hour may be stated as an aggregate index of all rate classifications.